

Supreme Court, U. S.

FILED

APR 7 1978

MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19\_\_\_\_

No. 77-1439

WILLIAM RILEY HUGHES,  
*Appellant*

vs.

THE STATE OF OKLAHOMA  
*Appellee*

APPEAL FROM THE COURT OF CRIMINAL  
APPEALS OF THE STATE OF OKLAHOMA  
JURISDICTIONAL STATEMENT

ROBERT M. HELTON  
713 Lamar Street  
Wichita Falls, Texas 76301

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19\_\_\_\_

No. \_\_\_\_\_

WILLIAM RILEY HUGHES, *Appellant*

vs.

THE STATE OF OKLAHOMA, *Appellee*

---

APPEAL FROM THE COURT OF CRIMINAL  
APPEALS OF THE STATE OF OKLAHOMA

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JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, William Riley Hughes, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment and sentence entered by the Court of Criminal Appeals of The State of Oklahoma in this case and should exercise such jurisdiction herein.

OPINION BELOW

The opinion of The Court of Criminal Appeals of The State of Oklahoma appears in 572 P. 2d 573 and 48 Okl. Bar Journal 2723 and is included herein as Appendix A (p. A1).

## GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a state criminal case wherein the appellant was convicted of unlawfully transporting for sale outside of the State of Oklahoma minnows which were seined or procured within the waters of Oklahoma, pursuant to the provisions of Title 29 Okla. Stat. § 4-115B. For this misdemeanor grade offense appellant was fined \$200.00 and costs.

December 6, 1977, is the date and entry of the judgment sought to be reviewed; January 6, 1978, is the date and entry of the order denying a rehearing; and the notice of appeal was filed on January 12, 1978, in The Court of Criminal Appeals of the State of Oklahoma.

Title 28 U.S.C. § 1257(2) is believed to confer jurisdiction on this Court.

The case of *Charleston Federal Sav. & Loan Asso. v. Alderson* (1945) 324 US 182, 65 S Ct 624, 89 L Ed 857, reh den 324 US 888, 65 S Ct 863, 89 L Ed 1436 (see the last paragraph, 324 US at 185, 65 S Ct at 627, and authorities there collected and cited), is relied upon to sustain this Court's jurisdiction.

Since the validity of a state statute is involved, its text, verbatim, follows:

"No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;

2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

The official edition citation is: Title 29 Okl. Stat. § 4-115B. The official Session Law citation is: Laws of 1974, c. 17, § 4-115B.

A copy of the judgment is appended as Appendix A (p. A1). A copy of the order denying a rehearing is appended as Appendix B (p. A-6). A copy of the notice of appeal is appended as Appendix C (p.A-8). A copy of Title 29 Okl. Stat. § 4-115 and 4-116, verbatim, is appended as Appendix D (p. A-12).

## QUESTION PRESENTED.

As applied, is Title 29 Okla. Stat. § 4-115B repugnate to Art. I, § 8, cl. 3, U.S. Constitution?

## STATEMENT OF THE CASE

The facts were all stipulated. The opinion below fairly and correctly states them. It will be quoted:

"The defendant for thirty years prior to the date of the offense in question was licensed under the law of the State of Texas as a minnow dealer; the defendant had a regular

commercial minnow business located in Archer County, Texas, approximately two miles south of Wichita Falls, Texas; he had been engaged in such business for one year before the date of the offense in question; on the day in question he purchased a load of minnow[s] from Fred Schokey, a minnow dealer licensed under the laws of the State of Oklahoma, at Mr. Schokey's place of business located at Purcell, Oklahoma; defendant was en route to his place of business at Wichita Falls, Texas, transporting the load of minnows in his vehicle, when he was detained and arrested in Waurika, Jefferson County, Oklahoma; the wholesale value and cost price of the minnows was \$350.00, and the defendant was detained and arrested by Hackell Bershere, an Oklahoma licensed Game Ranger, without a warrant. The amended information further reflects that the date of the purchase was on or about April 23, 1976."

Extracts from the opinion below which sustain this Court's jurisdiction under the rule of *Alderson*, *supra*, are:

"Defendant's sole assignment of error is that 29 O.S. Supp. 1974, § 4-115B violates the interstate commerce clause of the Constitution of the United States which confers upon the Congress of the United States exclusive power to regulate interstate commerce." Slip opinion, p. 2, Appendix A (p. A-2).

". . . No person is allowed to export natural minnows for sale outside of Oklahoma. Such a prohibition is not repugnant to the commerce clause and the defendant's

assignment of error is without merit. The judgment and sentence appealed from is, accordingly, *AFFIRMED.*" Slip opinion, p. 4, Appendix A (p. A-5).

This Court can and should judicially notice that the Court below is the highest appeal court in Oklahoma to which the case could be appealed in that state.

#### **SUBSTANTIALITY OF FEDERAL QUESTION**

This appeal presents, on the one hand, the right of Oklahoma to utilize its state police power and the right, on the other hand, of the citizens of other states to engage in interstate commerce with citizens of Oklahoma where the subject of the commerce is natural minnows taken from the waters of Oklahoma. The rights at stake are of that character and nature and importance which would warrant a final determination by this High Court. It is not enough that Oklahoma has the power to "reduce depletion of [her] natural minnows". The power is not invoked and the means are unwarranted when the state directly regulates interstate commerce for the purpose of retaining her minnows within her borders, when, at the same time she does not retain any state control beyond the use of the first party who is authorized to take natural minnows. Section 4-115B is a transportation law, prohibitory in nature. Its purpose is to stop the exportation of minnows out of Oklahoma. It does not limit the use of the minnows. Section 4-116A is the use regulating law. The use restriction of § 4-116A extends no further than to the party licensed to "take" the natural minnows from state waters. That party was Fred Schokey. Since the appellant purchased the minnows from Fred Schokey, appellant could very well be held to have purchased the minnows freed from all state control.

If so, commerce started; Oklahoma's police power ended; and only Congress is authorized to regulate the interstate character of the commerce involved in this case. If in the hands of the appellant the minnows are property freed of all state control and have become articles of trade, Oklahoma is "without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state." (Citations omitted.) *Haydel's* case, 278 U.S. at 10, 49 S Ct at 4, 73 L Ed. 147 at \_\_\_\_\_.

As applied to the facts in this case and the statutes enacted by Oklahoma, these tendered constitutional issues have not heretofore been settled by this Court. This fact makes the issues substantial.

Six states border Oklahoma. It is well known that in the southwestern sun belt the minnow business is substantial.

The case is not mooted by any facts; not colored or feigned. It is an actual case and controversy. The low grade of the criminal offense does not reduce its interstate aspects. The question presented is of that nature and character and importance that would warrant plenary consideration, with briefs on the merits and oral argument, for their resolution.

#### **CONCLUSION**

For the reasons stated above, appellant submits that this appeal brings before the Court a substantial and important federal constitutional question which requires plenary consideration, with

briefs on the merits and oral argument, for their resolution.

Dated April 4, 1978.

Respectfully submitted,

**ROBERT M. HELTON,**  
Attorney for Appellant

**APPENDIX A**

**WILLIAM RILEY HUGHES, Appellant**

vs.

**THE STATE OF OKLAHOMA, Appellee**

**No. M-77-125**

**COURT OF CRIMINAL APPEALS  
OF OKLAHOMA**

---

**APPENDIX**

**OPINION AND JUDGMENT  
OF THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA**

**BUSSEY, PRESIDING JUDGE:**

The Appellant, William Riley Hughes, herein-after referred to as defendant, was charged in the District Court, Jefferson County, Case No. CRM-76-42, with Unlawfully Transporting for Sale Outside of the State of Oklahoma Minnows Which Were Seined or Procured Within the Waters of Oklahoma, pursuant to the provisions of 29 O.S. Supp. 1974, § 4-115B. The evidence was stipulated to by the parties and submitted to the trial court after a jury was waived. Upon conviction, the trial court set punishment at a fine of Two Hundred Dollars (\$200.00) and costs. From said judgment and sentence a timely appeal has been perfected to this Court.

The stipulated facts are as follows: The defendant for thirty years prior to the date of the offense in question was licensed under the law of the State of Texas as a minnow dealer; the defendant had a regular commercial minnow business located in Archer County, Texas, approximately two miles south of Wichita Falls, Texas; he had been engaged in such business for one year before the date of the offense in question; on the day in question he purchased a load of minnow from Fred Schokey, a minnow dealer licensed under the laws of the [p. 1] State of Oklahoma, at Mr. Schokey's place of business located at Purcell, Oklahoma; defendant was en route to his place of business at Wichita Falls, Texas, transporting the load of minnows in his vehicle, when he was detained and arrested in Waurika, Jefferson County, Oklahoma; the wholesale value and cost price of the minnows was \$350.00, and the defendant was detained and arrested by Hackell Bershere, an Oklahoma licensed Game Ranger, without a warrant. The amended information further reflects that the date of the purchase was on or about April 23, 1976.

Defendant's sole assignment of error is that 29 O.S. Supp. 1974, § 4-115B violates the interstate commerce clause of the Constitution of the United States which confers upon the Congress of the United States exclusive power to regulate interstate commerce.

Section 4-115B reads as follows:

"No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;
2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

The defendant argues that § 4-115B prohibits the export out of Oklahoma of minnows and that such state action is condemned by the United States Supreme Court in *Foster-Fountain Packing Co. v. Haydell*, 278 U.S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928), as a violation of the interstate commerce clause.

However, *Foster*, *supra*, dealt with a Louisiana statute which prohibited raw shrimp, or raw shells, hulls and heads from being shipped out of Louisiana but allowed shrimp meat and bran, canned and manufactured within Louisiana, to be [p. 2] freely shipped and sold in interstate commerce. The Court held that Louisiana, as the representative of its people, could have retained the shrimp for consumption and use in Louisiana. It did not. The Court found that the sole purpose of the Act was to favor the canning of meat and manufacture of bran in Louisiana by withholding raw shrimp from plants located in nearby Mississippi. The Louisiana Act was, therefore, in violation of the commerce clause.

In the instant case § 4-115B prohibits anyone from transporting or shipping for sale, outside of Oklahoma, minnows which were seined or procured within the waters of Oklahoma. The issue raised is clearly distinguishable from that raised in *Foster*, *supra*, since the primary purpose of § 4-115B is to reduce depletion of natural minnows.

The United States Supreme Court has held on numerous occasions that the wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein. *Lacoste v. Department of Conservation*, 263 U.S. 545, 44 S. Ct. 186, 68 L. Ed. 437 (1928); *Geer v. State of Connecticut*, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896); and *Foster*, supra. As stated in *Lacoste*, supra, protection of the wildlife of a state is peculiarly within the police power of the state, and the state has great latitude in determining what means are appropriate for its protection.

As aptly stated in the State's brief, Oklahoma law does not prohibit commercial minnow hatcheries within her borders [p. 3] from selling stock minnows to anyone, resident or nonresident, and minnows purchased therefrom may be freely exported. However, the law served to protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation. No person is allowed to export natural minnows for sale outside of Oklahoma. Such a prohibition is not repugnant to the commerce clause and the defendant's assignment of error is without merit. The judgment and sentence appealed from is, accordingly, *AFFIRMED*.

AN APPEAL FROM THE DISTRICT COURT,  
JEFFERSON COUNTY, OKLAHOMA.

HONORABLE P. C. LARGENT, JR., JUDGE

WILLIAM RILEY HUGHES was convicted for the offense of Unlawfully Transporting for Sale Outside of the State of Oklahoma Minnows Which Were Seined or Procured Within the Waters of Oklahoma; his punishment was assessed at a fine of Two Hundred Dollars (\$200.00) and costs, and he appeals. *AFFIRMED*.

R. M. HELTON,  
WICHITA FALLS, TEXAS,  
Attorney for Appellant

LARRY DERRYBERRY, ATTORNEY GENERAL  
BILL J. BRUCE, ASST. ATTY. GENERAL  
Attorneys for Appellee

OPINION BY BUSSEY, P. J.,  
CORNISH, J., and BRETT, J. CONCUR.

**FILED**  
In Court of Criminal Appeals  
State of Oklahoma  
December 6, 1977  
Ross N. Lillard, Jr., Clerk

**APPENDIX B**

**WILLIAM RILEY HUGHES, Appellant**

vs.

**THE STATE OF OKLAHOMA, Appellee**

**No. M-77-125**

**COURT OF CRIMINAL APPEALS  
OF OKLAHOMA**

---

**ORDER DENYING REHEARING AND  
DIRECTING ISSUANCE OF MANDATE**

**ORDER OF THE COURT OF  
CRIMINAL APPEALS OF THE  
STATE OF OKLAHOMA ON REHEARING**

NOW, on this twenty-first day of December, 1977, the Court having considered the appellant's application for rehearing in the above styled and numbered cause, and being fully advised in the premises, finds that the same should be denied, and the Clerk of this Court is directed to issue the mandate FORTHWITH.

**IT IS SO ORDERED.**

WITNESS OUR HANDS, and the Seal of this Court this sixth day of January, 1978.

HEZ J. BUSSEY, PRESIDING JUDGE  
TOM BRETT, JUDGE

ATTEST:

ROSS N. LILLARD, JR.  
CLERK

**FILED**  
In Court of Criminal Appeals  
State of Oklahoma  
January 6, 1978  
Ross N. Lillard, Jr., Clerk

**APPENDIX C**

**WILLIAM RILEY HUGHES, Appellant**  
vs.

**THE STATE OF OKLAHOMA, Appellee**  
No. M-77-125

**COURT OF CRIMINAL APPEALS  
OF OKLAHOMA**

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**NOTICE OF APPEAL**

1. William Riley Hughes, appellant, is the party taking the appeal.
2. He appeals from the Order Denying Rehearing and Directing Issuance of Mandate.
3. It was entered January 6, 1978.
4. He appeals to the Supreme Court of the United States by authority of 28 U.S.C. § 1257 (2).
5. This notice is directed to the Hon. Larry Derryberry, Attorney-General, and to the Hon. Bill J. Brice, Assistant Attorney-General, both of the State of Oklahoma, counsels of record in this Court, whose offices are in the State Capital Building at Oklahoma City, Oklahoma.

Respectfully given,

R. M. HELTON,  
Counsel for Appellant  
713 Lamar St.  
Wichita Falls, Texas 76301

**CERTIFICATE OF SERVICE**

I, R. M. Helton, a Member of the Bar of the Supreme Court of the United States, certify that a single Xerox copy of this Notice of Appeal together with a Xerox copy of Entry of Appearance in the Supreme Court of the United States of the undersigned as counsel for the appellant-petitioner therein, (the original of which is annexed to the original notice of appeal), was on the tenth day of January, 1978, mailed, first class, properly addressed and with sufficient postage, to the

Hon. Larry Derryberry, Attorney-General, and Hon. Bill J. Brice, Assistant Attorney-General, both of the State of Oklahoma, Office of the Attorney-General, State Capital Building, State of Oklahoma, Oklahoma City, Oklahoma, 73105, a distance of less than 500 miles.

I further certify that the aforesaid service constitutes service of the Notice of Appeal upon all parties required to be served in this case.

I further certify that on the tenth day of January, 1978, the original of this Notice of Appeal and the original of my Entry of Appearance in the Supreme Court of the United States was mailed, first class, properly addressed and with sufficient postage to the

Hon. Ross N. Lillard, Jr., Court Clerk, The Court of Criminal Appeals of the State of Oklahoma, State Capital Building, State of Oklahoma, Oklahoma City, Oklahoma, 73105.

Dated this the tenth day of January, 1978.

R. M. HELTON,  
Counsel for Appellant  
713 Lamar St.  
Wichita Falls, Texas 76301  
Member of the Bar of the  
Supreme Court of the  
United States

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 19\_\_\_\_

No. \_\_\_\_\_

WILLIAM RILEY HUGHES, Petitioner

vs.

THE STATE OF OKLAHOMA, Respondent

**ENTRY OF APPEARANCE**

The Clerk will enter my appearance as Counsel for the Petitioner.

R. M. HELTON,  
713 Lamar Street  
Wichita Falls, Texas 76301

The Clerk is requested to notify counsel of action of the Court by means of:

(X) Regular Mail

**FILED**  
In Court of Criminal Appeals  
State of Oklahoma  
January 12, 1978  
Ross N. Lillard, Jr., Clerk

**APPENDIX D**

**STATUTORY PROVISIONS INVOLVED**  
**29 O.S. § 4-115**

**MINNOW DEALER'S INTERSTATE LICENSE**

A. No person may ship or transport minnows for sale into this state from an outside source without having first procured a license for such from the Director.

B. No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;

2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.

C. The fee for a license under this section shall be:

1. For residents, One Hundred Dollars (\$100.00);

2. For nonresidents, Three Hundred Dollars (\$300.00).

D. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Dollars (\$200.00).

Laws 1974, c. 17, § 4-115, eff. April 8, 1974.

**29 O.S. § 4-116**  
**MINNOW DEALER'S INTRASTATE LICENSE**  
 (Source within state, except as otherwise provided)

A. No person may seine, trap, transport and/or sell minnows within the state for commercial purposes without having first procured a license for such from the Director.

B. Each applicant shall be a bona fide resident of Oklahoma for a period of one (1) year immediately preceding his application, and it must appear to the Director that the applicant does not intend to use the license for the purpose of violating any of the laws of the State of Oklahoma, and the applicant's equipment complies with the provisions of Section 6-401 of this Code.

C. Persons excepted from the license requirements of this section are:

1. Those who seine, trap or transport minnows for their own use as bait, if the seine used does not exceed twenty (20) feet in length, and the mesh is no larger than one-fourth inch square, or if only one trap is used;

2. Any person under sixteen (16) years of age who seines, traps and sells minnows for commercial purposes within the county of his residence in quantities which do not require a special vehicle for

transportation, as described in paragraph 4, subsection A of Section 6-401 of this Code;

3. Any retailer selling lawfully acquired minnows.

D. The fees for a license under this section and the fee for renewal of such a license shall be Thirty-five Dollars (\$35.00).

E. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Dollars (\$200.00).

Laws 1974, c. 17, § 4-116, eff. April 8, 1974.

Supreme Court, U. S.  
FILED

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MICHAEL RODAK, JR., CLERK

**APPENDIX**

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1978

**No. 77-1439**

**WILLIAM RILEY HUGHES**  
*Appellant*

vs.

**THE STATE OF OKLAHOMA**  
*Appellee*

**On Appeal From The Court of Criminal Appeals  
Of The State of Oklahoma**

**Jurisdictional Statement Filed April 7, 1978  
Probable Jurisdiction Noted October 2, 1978**

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Relevant Docket Entries  
COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. M-77-125

<u>Date</u>	<u>Docket Entry</u>
Feb. 7, 1977	Petition in Error.
Dec. 6, 1977	J. E. Opinion. Affirmed Bussey, P.J.
Dec. 21, 1977	Appellant's Application for rehearing.
Jan. 6, 1978	J. E. Order, Bussey, P.J., Brett, J. - Order Denying Rehearing and Issuance of Mandate.
Jan. 6, 1978	Mandate Issued.
Jan. 12, 1978	Appellant's Notice of Appeal to U. S. Supreme Court.
Jan. 18, 1978	Appellant's request for certification, trans- mission of record to Clerk of U. S. Supreme Court (as amended).
Jan. 18, 1978	Appellant's Designation of Record.
Mar. 31, 1978	Record mailed this date to U. S. Supreme Court Clerk.
Oct. 5, 1978	Certified copy of order from U. S. Supreme Court noting probable jurisdiction in this case.

Opinion and Judgment of the Court of  
Criminal Appeals of Oklahoma  
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Order Denying Rehearing and Directing  
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Notice of Appeal filed in the Court of  
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ctional Statement)

SUPREME COURT OF THE UNITED STATES

No. 77-1439

APPEAL from the Court of Criminal  
Appeals of Oklahoma.

The statement of jurisdiction in this  
case having been submitted and considered  
by the Court, probable jurisdiction is  
noted.

October 2, 1978

Supreme Court, U. S.  
FILED

JUN 16 1978

MICHAEL ROBAK, JR., CLERK

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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**No. 77-1439**

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WILLIAM RILEY HUGHES,  
*Appellant,*

VERSUS

THE STATE OF OKLAHOMA,  
*Appellee.*

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## **MOTION TO AFFIRM JUDGMENT OF STATE COURT**

---

LARRY DERRYBERRY  
Attorney General of Oklahoma

BILL J. BRUCE  
Assistant Attorney General  
Chief, Criminal Division

112 State Capitol Building  
Oklahoma City, Oklahoma 73105

*Attorneys for Appellee*

June, 1978

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In the  
Supreme Court of the United States  
OCTOBER TERM, 1977

No. 77-1439

WILLIAM RILEY HUGHES,  
*Appellant,*

VERSUS

THE STATE OF OKLAHOMA,  
*Appellee.*

---

**MOTION TO AFFIRM JUDGMENT OF  
STATE COURT**

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**MOTION TO AFFIRM**

Pursuant to Rule 16 of this Court, comes now the appellee in the above-styled and numbered cause, by and through the Office of Attorney General of Oklahoma, and moves this Honorable Court to affirm the Judgment of the Oklahoma Court of Criminal Appeals for the reason that the singular decision cited by appellant to support his argument as to the substantiality of a federal question, *Foster-Fountain Packing Company v. Haydell*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), is clearly distinguishable and that the question urged by appellant has been plainly foreclosed by prior decisions of this Court, making further argument unnecessary.

**QUESTION PRESENTED**

Is paragraph B within 29 O.S. Supp. 1974, § 4-115 repugnant to Article I, Section 8, ch. 3, United States Constitution?

**STATEMENT OF THE CASE**

Appellee accepts appellant's Statement of the Case and agrees that the opinion below, which appears at 572 P.2d 573, fairly and correctly states the facts.

**ARGUMENT**

Appellant contends that paragraph B within the following section of Oklahoma law is an impermissible exercise of police power which is exclusively held by the Congress of the United States.

Title 29 O.S. Supp. 1974, § 4-115 provides:

**"MINNOW DEALER'S INTERSTATE LICENSE**

"A. No person may ship or transport minnows for sale into this State from an outside source without having first procured a license for such from the Director.

"B. No person may transport or ship minnows for sale outside the State which were seined or procured within the waters of this State except that:

    1. Nothing contained herein shall prohibit any person from leaving the State possessing three (3) dozen or less minnows;

    2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.

"C. The fee for a license under this section shall be:

    1. For residents, one hundred dollars (\$100.00);

    2. For nonresidents, three hundred dollars (\$300.00).

"D. Any person convicted of violating any provisions (sic) of this section shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than two hundred dollars (\$200.00)."

In *Foster*, 278 U.S. at 12-13, 73 L.Ed. at 154, this Court contrasted the case then before it with *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896) and cases cited therein, stating in pertinent part:

"The purpose of the Louisiana Enactment differs radically from the Connecticut law there upheld. It authorizes the shrimp meat and bran, canned and manufactured within the State, freely to be shipped and sold in interstate commerce. . . . As representative of its people, the state might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the state. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. . . . Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the state is deemed to own or control the shrimp for the benefit of its people."

Thus, Louisiana had effectively reserved for domestic canneries the commercial exploitation of raw shrimp for interstate sale, while in the instant case, Oklahoma does not permit commercial export of minnows *ferae naturae*, directly or indirectly by anyone, resident or non-resident.

The underlying factual situation in the *Foster* decision is also clearly distinguishable. In the instant case, appellant does not contend that survival of his business is dependent upon purchases from minnow dealers or that he could not have purchased minnows from a commercial hatchery which develops its own stock. As noted in the opinion below, any person may purchase minnows from a commercial hatchery in Oklahoma and such minnows may be freely exported per 29 O.S. Supp. 1974, § 7-602, paragraph B(5), which provides:

"5. Minnows, fish, game and other wildlife lawfully bred or propagated may be knowingly sold, shipped or transported within or without this State."

Thus, the instant case is clearly distinguishable from *Foster-Fountain Packing Company v. Haydell*, *supra*, and language within that decision refutes rather than supports appellant's view. Succinctly stated, appellee submits that the appellant, an out-of-state dealer in minnows, has no constitutional right to take minnows initially derived from Oklahoma streams for commercial exportation, thereby depleting a natural resource, where Oklahoma law also bars its own citizens from such commercial exportation.

Further, prior decisions of this Court have effectively resolved the issue here raised, notably, *Lacoste v. Department*

*of Conservation*, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1928), and *Geer v. Connecticut*, *supra*. In the latter case, this Court stated:

"In other words, the sole issue which the case presents is, was it lawful under the Constitution of the United States (Section 8, Article 1) for the State of Connecticut to allow the killing of birds within the State during a designated open season, to allow such birds, when so killed, to be used, to be sold and to be bought for use within the State, and yet to forbid their transportation beyond the State? Or, to state it otherwise, had the State of Connecticut the power to regulate the killing of game within her borders so as to confine its use to the limits of the State and forbid its transmission outside of the State?"

This Court's well-reasoned opinion therein recognized the distinction of *animus ferae naturae* from commercial enterprises. If Oklahoma permitted her natural minnows taken from its waters to be sold by its own citizens in interstate commerce, certainly a different question would be posed. But we do not have that situation here. Appellee submits the decision and rationale in *Geer v. Connecticut*, *supra*, is on point with the facts of this case and is decisive of the issue raised here. No case cited by appellant purports to require the states to surrender control of their *animus ferae naturae* in the name of interstate commerce.

Wherefore, premises considered, appellee prays that the instant motion be sustained and the judgment of the Oklahoma Court be affirmed.

Respectfully submitted,

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June, 1978

**CERTIFICATE OF SERVICE**

I, Bill J. Bruce, a member of the Bar of the Supreme Court of the United States, certify that three copies of the attached Motion was air mailed with sufficient postage prepaid on the \_\_\_\_\_ day of June, 1978, to the following counsel for appellant:

Mr. R. M. Helton  
713 Lamar Street  
Wichita Falls, Texas 76301

BILL J. BRUCE

Supreme Court, U.S.  
FILED

NOV 16 1978

SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1978

NO. 77-1439

WILLIAM RILEY HUGHES  
Appellant

vs.

THE STATE OF OKLAHOMA  
Appellee

ON APPEAL FROM THE COURT OF CRIMINAL  
APPEALS OF THE STATE OF OKLAHOMA

BRIEF OF APPELLANT

Robert M. Helton  
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Appellant's counsel

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**OCTOBER TERM, 1978**

No. 77-1439

**WILLIAM RILEY HIGHES, Appellant**

vs.

**THE STATE OF OKLAHOMA, Appellee**

**ON APPEAL FROM THE COURT OF CRIMINAL  
APPEALS OF THE STATE OF OKLAHOMA**

**BRIEF OF APPELLANT**

**OPINION BELOW**

The opinion and judgment of The Court of Criminal Appeal of the State of Oklahoma is officially reported in 572 P.2d 573. It is reprinted and appears as Appendix A, (p. A-1), to the Jurisdictional Statement.

## GROUNDS OF JURISDICTION OF SUPREME COURT

This Court has jurisdiction to review the order denying rehearing of the judgment and sentence of the Court of Criminal Appeals of Oklahoma under 28 USC § 1257 (2). Pursuant to Title 29 Okla. Stat. § 4-115B, appellant was convicted of unlawfully transporting minnows for sale outside of the State of Oklahoma which were seined or procured within the waters of Oklahoma. For this misdemeanor grade offense, appellant was fined \$200.00 and costs.

In the Court below, which was the highest court of the State in which a decision could be had, there was drawn in the question the validity of 20 Okla. Stat. § 4-115B on the grounds of its being repugnant to the interstate commerce clause, Art. I, § 8, cl. 3, Constitution of the United States, and the decision was in favor if its validity.

The case of *Charleston Federal Sav. & Loan Asso. v. Alderson*, (1945) 324 US 162, 65 S Ct 624, 89 L Ed 857, reh den 324 US 888, 65 S Ct 863, 89 L Ed 1436 (see the last paragraph, 324 US at 185, 65 S Ct at 627, and authorities there collected and cited), is relied upon to sustain this Court's jurisdiction.

Extracts from the opinion below which sustain this Court's jurisdiction under the rule of *Alderson*, supra, are:

"Defendant's sole assignment of error is that 29 O.S.Supp. 1974, § 4-115B violates the interstate commerce clause of the Constitution of the United States which confers upon the Congress of the United States exclusive power

to regulate interstate commerce." Slip opinion, p. 2 Appendix A, (p. A-2), Jurisdictional Statement.

"... No Person is allowed to export natural minnows for sale outside of Oklahoma. Such a prohibition is not repugnant to the commerce clause and the defendant's assignment of error is without merit. The judgment and sentence appealed from is, accordingly, AFFIRMED." Slip opinion, p. 4, Appendix A, (p. A-5), Jurisdictional Statement.

The time factors upon which jurisdiction rest are as follows: The opinion and judgment of affirmance was entered on December 6, 1977. (Appendix p. 1; Appendix A, (p. A-5), Jurisdictional Statement.) The order denying rehearing was entered on January 7, 1978. (Appendix p. 1; Appendix B, (p. A-6), Jurisdictional Statement.) The notice of appeal was filed on January 12, 1978. (Appendix p. 1; Appendix C, (p. A-11), Jurisdictional Statement.) The Clerk of the Court below mailed the record to the Clerk of this Court on March 31, 1978. (Appendix p. 1.) The Jurisdictional Statement was filed and the appeal was docketed in this Court on April 7, 1978. The order of this Court noting probable jurisdiction was entered on October 2, 1978. (Appendix, p.2.)

## CONSTITUTIONAL PROVISION AND STATUTES WHICH THE CASE INVOLVES

The commerce clause, (Art. I § 8, cl. 3), to the Constitution of the United States provides as follows:

"The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

The Oklahoma Wildlife Conservation Code is found in Okla. Laws of 1974, c 17; Title 29 O.S.Supp., 1974, as amended; Title 29 O.S.A. §§ 1-101 et seq. The provisions that are involved are as follows:

"§ 2-103 Buy "Buy" is to obtain an item by an exchange for consideration, and includes barter, offer to buy or the act of buying."

"§ 2-109 Endangered "Endangered" refers to any wildlife species or subspecies whose prospects of survival and reproduction are in immediate jeopardy as determined by Act of Congress, Oklahoma statute or Commission resolution. The following are considered "endangered": American peregrine falcon, blackfooted ferret, Indiana bat, red wolf, southern bald eagle and whooping crane."

"§ 2-110 Fishing "Fishing" is defined as the taking or attempting to take fish or other aquatic dwelling organisms by hook and line, seine, trap or such other means as may be designated as legal by the provisions of this Code or by the Oklahoma Wildlife Conservation Commission."

"§ 2-113 Game "Game," when used alone, refers to mammals and birds and does not include fish."

"§ 2-115 Game fish "Game fish" is a fish normally sought after by sportsmen, and includes only largemouth bass, smallmouth bass, spotted bass, black crappie, white crappie, northern pike, trout, striped bass, walleye, blue

catfish and channel catfish. Blue catfish and channel catfish are herein defined to mean "forked tail" catfish."

"§ 2-121 Minnows "Minnows" are small nongame fish commonly used for bait and include bluntnose, bullhead minnows, chubs, dace, darters, fatheads, killfish, small carp, small goldfish, shiners and stonerollers."

"§ 2-123 Nongame fish "Nongame fish" are all fish not game fish."

"§ 2-133 Protected wildlife "Protected wildlife" is all wildlife which is accorded some measure of protection in the time or manner of taking other than restriction in the use of artificial lights or poison."

"§ 2-135 Rare "Rare" refers to wildlife species or subspecies that, although not presently threatened with extinction, are in such small numbers through their range that they may be endangered if their environment deteriorates. Such species may be declared "rare" by Act of Congress, Oklahoma statutes or Commission resolution. The following are specifically considered "rare" in Oklahoma: greater sandhill crane, lesser prairie chicken, northern greater prairie chicken, spotted bat and western burrowing owl."

"§ 2-143 Transport "Transport" is the carrying or moving by any means, causing to be carried or moved by any means, or accepting and receiving wildlife for such carrying or movement."

"§ 2-149 Wildlife "Wildlife" is all wild birds, mammals, fish, reptiles, amphibians and other wild aquatic forms and all other wild animals, regardless of classification, whether resident, migratory or imported, protected or unprotected, dead or alive, and shall extend to and include any and every part of any individual species of wildlife."

§ 4-115 Minnow dealer's interstate license. This section is found reprinted in Appendix D, (p. A-12), Jurisdictional Statement.

§ 4-116 Minnow dealer's intrastate license (source within state, except as otherwise provided). This section is found reprinted in Appendix D, (p. A-13), Jurisdictional Statement.

"§ 7-204 Ownership of wildlife All wildlife found in this state is the property of this state."

#### **QUESTION PRESENTED**

Is subsection B of section 4-115 of 29 O.S.Supp., 1974 repugnant to Art. I, § 8, cl. 3, United State Constitution?

#### **STATEMENT OF THE CASE**

The facts were all stipulated. The opinion below fairly and correctly states them. It will be quoted:

"The defendant for thirty years prior to the date of the offense in question was licensed under the law of the State of Texas as a minnow dealer; the defendant had a regular com-

mercial minnow business located in Archer County, Texas, approximately two miles south of Wichita Falls, Texas; he had been engaged in such business for one year before the date of the offense in question; on the day in question he purchased a load of minnow[s] from Fred Schokey, a minnow dealer licensed under the laws of the State of Oklahoma, at Mr. Schokey's place of business at Purcell, Oklahoma; defendant was [i]n route to his place of business at Wichita Falls, Texas, transporting the load of minnows in his vehicle, when he was detained and arrested in Waurika, Jefferson County, Oklahoma; the wholesale value and cos. price of the minnows was \$350.00, and the defendant was detained and arrested by Hackell Bershere, an Oklahoma licensed Game Ranger, without a warrant. The amended information further reflects that the date of the purchase was on or about April 23, 1976." Appendix A, (p. A-2), Jurisdictional Statement.

#### **ARGUMENT**

This appeal presents, on the one hand, the right of inhabitants of the United States to engage in interstate commerce with citizens of Oklahoma and the right, on the other hand, of Oklahoma to utilize her police power to prevent it, where the subject of the commerce is minnows taken from the waters of Oklahoma.

It is very important to observe that the subject of the commerce in question is a natural resource of Oklahoma. The specific resource is minnows. It will become patent from the record that they are not shown to be depleted or endangered.

Upon authority of Title 29 O.S. Supp., 1974, § 4-115B, Oklahoma intercepted, by means of arrest, and prevented the appellant from transporting and shipping to his market point and place of business in Texas, minnows that he purchased in Oklahoma from a locally licensed minnow dealer. To date, Oklahoma has successfully prevented interstate commercialism in these minnows by national citizens upon authority of § 4-115B of its Wildlife Conservation Code of 1974, which is Title 29 of its general statutes.

Section 4-115B provides the following:

"No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;
2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

#### **APPELLANT'S CONTENTIONS**

Appellant, who engages in the minnow business in Texas, contends, both on its face and in its plain effect, that § 4-115B constitutes an impermissible discrimination against appellant's right, secured to him by the commerce clause of the United States Constitution, to buy minnows in Oklahoma from licensed dealers therein who took them from her waters, including the right to transport them to Texas to his market point. Further, appellant contends that there is nothing about the nature of the minnows as a

natural resource and their Oklahoma origin that prevents them from being privately owned articles of trade and commerce when they are purchased in Oklahoma from a licensed dealer.

#### **SUMMARY OF POINTS OF ARGUMENT IN SUPPORT OF APPELLANT'S CONTENTIONS**

I. Oklahoma's general police power to enact § 4-115B was never lawfully invoked.

A. Though the general police power exists, facts are neither facially shown to exist in the Oklahoma conservation code nor shown by the stipulated facts which would have authorized the use of such power to enact § 4-115B.

B. In the alternative, if the use of the general police power was authorized, in using it a policy of economic protectionism was created by the use of export discrimination in the passage of § 4-115B which annulled the valid use of the general power.

II. Oklahoma derived no power to enact § 4-115B solely from the state ownership doctrine of *Greer V. Connecticut*, (1896) 161 US 519, 16 S CT 600, 40 L Ed 793. That power and its doctrine is no longer viable when it is sought to be used to limit the right of a national citizen under the interstate commerce clause.

In holding that § 4-115B was constitutional, Oklahoma's Highest Court found that the object or purpose of the law was different than the object or purpose of the law in the *Haydel* case, (278 US1, 49 S Ct1, 73 L Ed

147, (1928). It held that the "primary purpose of § 4-115B is to reduce depletion of natural minnows." "[T]he law served to protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation." Slip opinion, Appendix A, (pages A-3 and A-4), Jurisdictional Statement.

"One challenging the validity of a state enactment on the grounds that it is repugnant to the commerce clause is not necessarily bound by the legislative declaration of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce." *Haydel* case, 287 US at 10, 49 S Ct at 3. The opinion of the highest court of a state is "not free from constitutional scrutiny" by this Court. *City of Philadelphia v. New Jersey*, 1978, 98 S Ct at 2535.

Since the Oklahoma Wildlife Conservation Code is barren of any specific fact finding that her minnows are depleted or are in danger of being depleted, and, since no specific provisions exist therein from which such finding could be inferred, (for example, 'catch' limit or requirement that the use be confined to Oklahoma), the protection-against-depletion-through-commercial-exportation finding of Oklahoma's Highest Court is a "specious reason". *Douglas v. Seacoast Products, Inc.*, 1977, 97 S Ct at 1752, footnote 21. In misconceiving the law's purpose or object, and thereby failing to observe the policy of economic protectionism by the use of an export discrimination that it created, Oklahoma's Highest Court fell into error when it distinguished the *Haydel* case.

## II

Section 4-116A authorized Mr. Fred Schokey, (an authorized minnow dealer), to seine, without a catch limit, natural minnows from Oklahoma's water. Thereunder, he

is required to sell them in Oklahoma. Thereunder, the dealer's buyer, (the appellant), can buy minnows in Oklahoma in unlimited numbers; is unlimited in his right to sell or use them; and is unlimited as to the place where such rights can be exercised. By definition, (§ 2-121), all minnows--whether natural or hatchery in origin--are "bait", not human food.

Without question, since minnows are a natural resource of the state, police power exists which would have authorized Oklahoma to enact laws that would protect the people of that state against the depletion of minnows. But the law must have as its purpose that very objective. Oklahoma cannot use her police power authority as a pretext or guise in order to achieve a purpose in a law that in truth and in fact the people of that state have no public interest in, but, on the other hand is vital to the national citizen.

When § 4-115B is viewed in the light of § 4-116A and § 2-121 and the Wildlife Conservation Code as a whole, it is patent that the object and purpose of § 4-115B was to create a policy of economic protectionism by the use of an export discrimination. Minnow hatchery owners may sell in the export market. Natural minnow dealers are *indirectly* deprived of that right. National citizens are also *directly* deprived of that right.

The Oklahoma Wildlife Conservation Code reflects no police power purpose with respect to natural minnows. No depletion of minnows is shown to exist and no conservation of them is shown to be needed. No 'catch' limit section exists. The buyer's *use rights* are unrestricted. Minnows are shown therein to be fish bait, not human food. They are not shown by the law to be dangerous to mankind. Human morals are not involved. Section 4-115B

does not direct itself to the general welfare of the people. Section 4-115B is directed to a policy of economic protectionism by the use of an export discrimination involving business. A simple economic protectionism policy is created by state legislation. The hatchery minnow business is preferred to the business detriment of the natural minnow dealers and the national citizens. One may successfully engage in interstate commerce while the other cannot. The inequality is achieved indirectly by regulating transportation. The purchasing power of the export buyers of natural minnows is, by law, limited to three dozen minnows. Yet the purchasing power of the export buyers of hatchery minnows is unlimited. In short, Oklahoma's law places an embargo on natural minnows for a business reason, which serves only those business men involved and does not serve the people of Oklahoma.

"The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. [Citations omitted.] The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 1978, 98 S Ct at 2535.

Interstate commerce begins with a purchase. ". . . [W]here goods are purchased in one state for transportation to another, the com-

merce includes the purchase quite as much as it does the transportation. . . . This has been recognized in many decisions construing the commerce clause. . . . Buying and selling and the transportation incidental thereto constitute commerce. . . . In no case has the court made any distinction between buying and selling or between buying for transportation to another state or transporting for sale in another state. Quite to the contrary, the import of the decisions has been that, if the transportation was incidental to buying or selling, it was not material whether it came first or last." Per Mr. Justice VAN DEVANTER, in *Dahnke-Walker Milling Co. v. Bondurant*, 1921, 257 US at 290-291, 42 S Ct at 108.

The rationale of the *Haydel* case, *supra*, was the condemnation of a policy of economic protectionism created by an export discrimination. No justifiable state interest could be found to exist in a law which prohibited the exportation of shrimp with heads and hulls *unremoved* but permitted it with them *removed*. If *all* shrimp had been ordained to not be exported the law would have been founded in a justifiable state interest.

By a parity of reason, if *all* minnows had been ordained to not be exported, the Oklahoma law would have been founded in a justifiable state interest. Since minnows are not a human food, but only a "bait" for other fish, a greater scrutiny is demanded. When properly scrutinized, for lack of a specific finding of "bait" depletion; for lack of a 'catch' limit and lack of restriction upon *use* in the hands of the buyer, from which a finding can be inferred that natural minnows are depleted or endangered, the export discrimination lacks a justifiable state interest and

becomes a policy of economic protectionism. *Haydel*, supra and *City of Philadelphia*, supra, are ample authority to condemn this Oklahoma law.

In § 4-115B, "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." *City of Philadelphia v. New Jersey*, 98 S Ct at 2537. "[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Id.* Under § 4-116A, appellant was not required to use the minnows in Oklahoma. Being free to use them at Wichita Falls, Texas, the minnows became appellant's unimpaired private property and articles of trade and commerce at Purcell, Oklahoma. "[A] State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State. *Foster Packing Co. v. Haydel*, supra, 278 U.S. at 10, S. Ct. at 4." *Id.*

In the context of minnows as a general class-- "when a state recognizes an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce; that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it." *H.P. Hood & Sons v. Du Mond*, 1949, 366 US at 535, 69 S Ct at 663.

The conclusion required to be reached is that § 4-115B is patently barren of any fact or facts which exhibit a state interest designed to promote and protect her interest in conservation, health, food, safety, morals, or general welfare of her people. The section is an export discrimination and becomes a policy of economic protectionism. It is

unconstitutional and void. Appellant's conviction rests upon a void law and must be reversed.

### III

Oklahoma derived no power to enact § 4-115B solely from the state ownership doctrine of *Greer v. Connecticut*, supra. That power and its doctrine is no longer viable when it is sought to be used to limit the right of a national citizen under the interstate commerce clause. The doctrine was first questioned in *Missouri v. Holland*, 252 US 416, 434, 40 S Ct 382, 284, 64 L Ed 641 (1920). It was next questioned in *Toomer v. Witsell*, 334 US 285, 402, 68 S Ct 1156, 1165, 92 L Ed 1460 (1948). In 1977, it was questioned in *Douglas v. Seacoast Products, Inc.*, 97 S Ct 1740, 1751. This year it was explained and held still viable when subjected to an attack based upon privileges and immunities and equal protection. However, when subjected to a commerce clause attack, it is said to be no longer the law. See the majority opinion in *Baldwin v. Fish & Game Com'n of Mont.*, 98 S Ct 1852, 1861, and the concurring opinion at 98 S Ct 1864-1865. As Mr. Chief Justice BURGER pointed out the state's authority to regulate its wildlife is to be found in the "State's special interest in regulating and preserving wildlife for the benefit of its citizens." But, it cannot do so invidiously or speciously. It may do so if and only if the true State's interest is achieved.

### CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

Robert M. Helton,  
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Counsel for appellant.

DEC 18 1978

MICHAEL ROBAK, JR., CLERK

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

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**No. 77-1439**

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WILLIAM RILEY HUGHES,

*Appellant,*

V E R S U S

THE STATE OF OKLAHOMA,

*Appellee.*

---

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

---

## BRIEF OF APPELLEE

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December, 1978

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In the  
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WILLIAM RILEY HUGHES,  
Appellant,

V E R S U S

THE STATE OF OKLAHOMA,  
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ON APPEAL FROM THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

**BRIEF OF APPELLEE**

**QUESTION PRESENTED**

Is 29 O.S. Supp. 1974, Section 4-115B repugnant to  
the Commerce Clause, Art. I, Section 8, Cl. 3, United States  
Constitution?

**STATEMENT OF THE CASE**

Appellee accepts appellants Statement of the Case and  
agrees that the opinion below, which appears at 572 P.2d  
573, fairly and correctly states the facts.

#### **INTRODUCTION OF ISSUE**

The Oklahoma statute in issue, 29 O.S. 1974, §4-115B, hereinafter referred to as Section B, provides:

"B. No person may transport or ship minnows for sale outside the State which were seined or procured within the waters of this State except that:

"1. Nothing contained herein shall prohibit any person from leaving the State possessing three (3) dozen or less minnows;

"2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

The crux of appellant's contention is that Oklahoma cannot constitutionally prohibit the export of minnows *ferae naturae* from Oklahoma if sale thereof is permitted within the State, concluding that Section B lacks a justifiable State interest and is directed to a policy of economic protectionism.

In response, appellee emphasizes the plain language of Section B prohibits the transporting of these minnows for sale outside the State, whether the transporter purchased them in Oklahoma as in this case, or whether the transporter personally seined or otherwise captured the minnows from Oklahoma waters.

#### **ARGUMENT**

The pivotal factual basis for appellant's argument is twofold, the first being that Oklahoma permits minnows *ferae naturae* to be sold intrastate, but does not permit the possessor to transport them out of state for resale; the second is that Oklahoma permits hatchery minnows to be freely exported for sale, while barring the exportation of natural minnows, except for three dozen, concluding that "Oklahoma's law places an embargo on natural minnows for a business reason, which serves only those businessmen involved and does not serve the people of Oklahoma" (Brief, pages 10-12).

Appellee readily concedes Section B seeks to prevent the commercial export of natural minnows, but strongly disagrees with appellant's contention that the statute lacks a justifiable State interest and his conclusion that it is directed to a policy of economic protectionism.

The purpose and net effect of Section B is apparent. Natural minnows, which serve as the natural food supply for other fish in their natural habitat, are captured and sold, but returned to Oklahoma waters in the form of bait. This procedure serves to accommodate the recreational fisherman, while preserving the habitat and balance of aquatic wildlife provided by nature. The obvious purpose of permitting sale is to provide a practical vehicle to serve the recreational fisherman, rather than to provide for commercial exploitation. In support of this view, the prohibition within Section B is not limited to those natural minnows purchased within the State, but to all natural minnows, whether purchased, seined or otherwise procured from Ok-

Iahoma waters. Further, this prohibition notably applies to all persons, including Oklahoma residents. Finally, the exception providing that any person may leave the State possessing three (3) dozen or less minnows could not arguably provide a loop-hole for commercial enterprise, but certainly would accommodate the recreational fisherman who may desire to fish in waters bordering a sister state, such as Lake Texoma.

Of course, the role of the minnow population as a source of food supply for gamefish is but one factor. Other apparent factors which must be considered are the sources upon which minnows feed, the increase of these sources due to reduced minnow population and the resulting effect upon the habitat. The difficulty is that the influence of the minnow population upon the balance provided by nature does not readily lend itself to measurable objective analysis, even where man is confident that he has knowledge of all pertinent facts. Since hatchery minnows are not seined from local waters, Oklahoma has no interest in preventing the free export thereof.

#### CITATIONS OF AUTHORITY

If Oklahoma permitted commercial export of natural minnows by residents, then *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), would clearly be on point to condemn Section B. However, the holding therein not only rests upon this distinction, but the rationale therein supports the very crux of Oklahoma's argument here that natural minnows are conserved for Oklahoma waters, where resident or non-resident may en-

Ioy the fruits of a protected habitat, but neither is permitted to take these minnows out of the state for commercial purposes. In *Foster*, 278 U.S. at 12-13, 73 L.Ed. at 154, this Court contrasted the case then before it with *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896), and cases cited therein, stating in pertinent part:

“The purpose of the Louisiana Enactment differs radically from the Connecticut law there upheld. It authorizes the shrimp meat and bran, canned and manufactured within the State, freely to be shipped and sold in interstate commerce. . . . As representative of its people, the state might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the state. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. . . . Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the state is deemed to own or control the shrimp for the benefit of its people.” (Emphasis added)

Thus, Louisiana had effectively reserved for domestic canneries the commercial exploitation of raw shrimp for interstate sale, while in the instant case, Oklahoma does not permit commercial export of minnows *ferae naturae*, directly or indirectly by anyone, resident or non-resident.

In other decisions cited by appellant, some involve subject matter where the commercial object is clearly not in dispute, *Dahnke-Walker Milling v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921) (Contract for wheat);

*Hood and Sons v. DuMond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948) (Receiving depot for milk); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed. 2d 304 (1977) (Commercial fishing license); *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) (Commercial shrimp boats); and these cases are clearly distinguishable.

Appellant also cites *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920), where Missouri sought to invalidate the federal Migratory Bird Treaty as being repugnant to the Tenth Amendment, U.S. Constitution. Noting that a national interest of nearly the first magnitude was involved, this Court simply reaffirmed the dual sovereignty concept that the federal government may act to protect a matter of national interest, even though individual states have an interest in the regulation of the same subject matter. The case is particularly inapposite.

Finally, appellant cites *Baldwin v. Fish and Game Commission of Montana*, \_\_\_\_ U.S. \_\_\_, 98 S.Ct. 1852, 56 L.Ed.2d 352 (1978), as authority that the "ownership doctrine" of *Geer* is no longer the law when subjected to a Commerce Clause attack (Brief, pg. 15). With all due respect, appellee submits that appellant's conclusion is premised upon fallacious semantics, particularly as applied to this case. Although State "ownership" may no longer be acceptable as a descriptive term of valid state interests in wildlife, this Court strongly reaffirmed the continued viability of these interests, 56 L.Ed.2d at 367, while appellant has cited no decision since *Geer* which has addressed a commerce clause or other constitutional claim analogous to the circumstances presented here. Indeed, appellee has

found none, as reflected in the case distinctions heretofore cited and, e.g., *City of Philadelphia v. New Jersey*, \_\_\_\_ U.S. \_\_\_, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), where the state permitted residents, but prohibited non-residents to dispose of waste; *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), which involved the grading of interstate apples; *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) and *Mullaney v. Anderson*, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), regarding commercial fishing licenses.

Conversely, this Court has consistently upheld internal state regulation concerning wildlife, e.g., *Geer v. Connecticut*, supra (Commerce clause); *Lacoste v. Department of Conservation*, 263 U.S. 545, 44 S.Ct. Rptr. 186, 68 L.Ed. 437 (1928) (Commerce clause); *State v. Kemp*, 73 S.D. 458, 44 N.W.2d 214 (1950), appeal dismissed, 340 U.S. 923, 71 S.Ct. 498, 95 L.Ed. 667 (1951) (privileges and immunities); *Baldwin v. Montana*, supra (privileges and immunities; equal protection), except where the state regulation was clearly a subterfuge to deprive non-residents from the economic benefits of interstate commerce accorded residents as in *Foster v. Haydel*, supra.

#### **CONCLUSION**

This Court will determine the necessary operation and effect of a state law upon a commerce clause challenge, *Lacoste v. Department of Conservation*, supra, and in determining what is interstate commerce, the courts look to practical considerations and the established course of business, *Foster v. Haydel*, supra.

Appellee submits the purpose, operation and practical effect of Section B is readily apparent as a conservation measure and the federal Constitution does not require that wildlife must be depleted or endangered to justify such conservation. Indeed, truly effective conservation guards against depletion that may cause wildlife to become endangered in the first instance.

Appellee further submits the Federal Commerce Clause does not require Oklahoma to leave non-residents free to transport natural minnows out of state for commercial purposes, while her own citizens are denied this privilege under the identical statute in issue, 29 O.S. Supp. 1974, §4-115B.

In short, no decision rendered by this Court has mandated that sovereign states surrender control of their *animus ferae naturae* where the subject matter has never been introduced into interstate commerce. Appellee prays the judgment of the Oklahoma court be affirmed.

Respectfully submitted,

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December, 1978

**CERTIFICATE OF SERVICE**

I, Bill J. Bruce, a member of the Bar of the Supreme Court of the United States, certify that three (3) copies of the attached Brief were air mailed with sufficient postage prepaid on the \_\_\_\_\_ day of December, 1978, to the following counsel for appellant:

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